



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 29 2009

Richard Davis

Alexandria, VA 22308

RE: MUR 6023
Richard Davis

Dear Mr. Davis:

On June 16, 2008, the Federal Election Commission ("the Commission") notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 19, 2009, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe you violated 2 U.S.C. §§ 441a or 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT: Rick Davis**

MUR: 6023

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7 **I. INTRODUCTION**

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9 This matter is based upon a complaint filed with the Federal Election Commission ("the
10 Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that Rick Davis, part
11 owner of 3eDC, LLC ("3eDC"), an Internet consulting company providing services to John
12 McCain's campaign, made a prohibited corporate contribution to John McCain 2008, Inc. and
13 Joseph Schmuckler, in his official capacity as treasurer ("McCain Committee"), when 3eDC
14 reduced the campaign's debt owed to 3eDC by over \$100,000.

15 Based upon the available information, including a written response from the respondent
16 denying the allegations, there is no information to indicate that Rick Davis may have committed
17 the violation alleged in the complaint. Accordingly, the Commission finds no reason to believe
18 that Rick Davis violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
19 connection with the allegations in this matter.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Factual Background**

22 The McCain campaign hired 3eDC, a company partly owned by McCain campaign
23 manager Rick Davis, to develop and maintain the campaign's website. 3eDC provided those
24 services, which included website development, e-mail list building, social networking tools, and
25 database management from January through May 2007. The complaint alleges that 3eDC
26 reduced its bill for Web services provided to the McCain campaign by \$107,475 at a time when

2904424428

1 the campaign was struggling financially and attempting to cut costs, resulting in a prohibited
2 corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to
3 public statements by the McCain campaign that there were billing errors and that the bill was
4 renegotiated. However, the complaint questions how “a campaign manager can renegotiate a
5 contract with a firm that he partly owns without at least the appearance that he has used his
6 influence with both parties to reduce the debt.” Complaint at 6.

7 A number of press articles report that Rick Davis arranged for the campaign’s initial
8 service contract with the vendor, 3eDC, and that the contract with 3eDC “initially brought
9 objections from top [McCain] advisers,” with some individuals accusing Davis of “self-dealing.”
10 Michael Cooper, *Savior or Machiavelli - McCain’s Top Aide Carries On*, N.Y. TIMES, Oct. 23,
11 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*,
12 WASHINGTON POST, June 26, 2008, at A01. However, Davis claims that he was not involved in
13 negotiating the initial contract or in any other discussions concerning 3eDC. In his response to
14 the complaint, Davis explains that he was “only a passive investor in 3eDC,” and not involved in
15 its day-to-day operations. Davis Response to Complaint (“Davis Response”) at 1. According to
16 Davis and other information obtained by the Commission, Davis recused himself from any
17 involvement with 3eDC while working for the McCain campaign. *Id.* at 1. There is conflicting
18 publicly available information, however, on whether Davis disclosed his financial interest in
19 3eDC to McCain early in the campaign. Cooper, *supra* at A26; Edward T. Pound, *Troublesome*
20 *Resumes*, U.S. NEWS & WORLD REPORT, May 28, 2007, at 50.

21 Information available reveals that the McCain Committee and 3eDC had a legitimate
22 dispute regarding the amount the campaign owed to 3eDC. According to information obtained
23 by the Commission, 3eDC and the McCain campaign entered into a contract for services on

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1 January 26, 2007. The contract details 3eDC's fee structure for its services to the McCain
2 Committee, including base fees, hourly rates for additional work, and administrative fees. In
3 May 2007, 3eDC decided to invoke the contract's termination clause because the campaign had
4 failed to pay two outstanding invoices when they were due, which 3eDC considered to be a
5 material breach of the agreement. Initially, 3eDC sent a letter, dated May 11, 2007, to the
6 McCain Committee requesting that it pay \$164,138.21, the total owed on those invoices, in order
7 to cure the material breach. The parties discussed the matter and decided to terminate the service
8 agreement. They entered into a Termination Agreement and Release ("Termination
9 Agreement"), dated May 18, 2007, that required payment of the overdue invoices totaling
10 \$164,138.21, required 3eDC to deliver a Final Statement of unpaid services to the campaign by
11 May 25, 2007, included a provision providing for accrual of 1% interest per month for amounts
12 that were past due, and required the campaign to make full payment, plus interest, within 60 days
13 of receipt of the Final Statement. The Termination Agreement estimated that the remaining
14 invoices to be included in the Final Statement totaled approximately \$725,000. The McCain
15 campaign paid \$164,138.21 upon execution of the agreement on May 18, 2007.

16 Information obtained by the Commission indicates that 3eDC never delivered a "Final
17 Statement" to the campaign, but instead "revised and confirmed the existing pending invoices."
18 Nevertheless, before the sixty-day deadline, the McCain Committee sent a letter dated July 16,
19 2007, invoking an "audit" provision from the Services and License Agreement that allowed the
20 campaign to conduct a review and analysis of the vendor's records supporting the fees and
21 expenses invoiced by 3eDC. The Commission's information indicates that the McCain
22 Committee also began its review in response to news reports alleging that Rick Davis personally
23 benefitted from the committee's contract with 3eDC.

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1 Upon completing its review, the McCain Committee submitted a seven-page summary to
2 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in
3 error or where it believed there was insufficient documentation to support the expenses, and
4 proposed to pay a total of \$585,001.83 to settle the debt. The McCain Committee's summary
5 provides a detailed account of the disputed invoice amounts. Specifically, the Committee
6 proposed a reduction in 3eDC's hosting charges by \$22,022.42; in Internet advertising by
7 \$42,341.34; and website content and development by \$63,119.24. During the course of its
8 review, the campaign also identified adjustments in 3eDC's favor, which it credited to 3eDC. In
9 total, the McCain Committee proposed a reduction of approximately \$127,483.

10 While 3eDC did not agree with all of the adjustments, it believed that the proposal was
11 commercially reasonable and agreed to accept the committee's proposal, subject to some
12 additional terms. Those terms included required interest payments of 6% a year, monthly
13 installments, a payment schedule, late fees of 1% per month, an acceleration clause if the
14 campaign ceased operating before December 1, 2008, and required that the McCain Committee
15 not seek reimbursement for the cost of its audit. 3eDC believed that accepting the campaign's
16 proposal, along with the additional terms, was commercially reasonable and the best course of
17 action to "resolve the matter in order to get paid." 3eDC balanced the costs of potential
18 litigation, which would also result in more time passing without receiving payments from the
19 campaign, compared with the "relatively small amount involved." Based on those
20 considerations, settling the matter at the reduced amount proposed made the most "financial
21 sense." Ultimately in September 2007, both parties agreed to these terms, which required 15
22 monthly payments that would end on December 25, 2008. According to information obtained by

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the Commission, all required monthly payments were made to 3eDC pursuant to the parties' negotiated resolution, and the full amount was paid several months early.

B. Legal Analysis

The Act prohibits corporations from making contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC may be subject to the prohibition against corporate contributions, depending on whether it elects to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R. § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the committee's debt as that reduction was well in excess of the maximum contribution of \$2,300 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its agreement with the McCain Committee was not commercially reasonable. Information regarding 3eDC's tax election is not publicly available. Therefore, it is unclear whether 3eDC is subject to the prohibition against corporate contributions or the contribution limits applicable to partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC's tax status because the Commission concludes that the agreement was commercially reasonable, and thus, there is no reason to believe there is a violations of either section 441a or 441b, as explained below.

The allegations in the complaint raise the question whether 3eDC's reduction of its bill of services to the McCain Committee by \$127,483 was commercially reasonable. Commission regulations provide that a commercial vendor may forgive or settle a debt for less than the full amount owed or may resolve a disputed debt, if it has treated the debt in a commercially

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reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated the debt in a commercially reasonable manner and satisfied the relevant requirements of 11 C.F.R. § 116.7 or 116.8. *Id.* at § 116.4(a). A vendor can demonstrate that it has treated a debt in a commercially reasonable manner by showing that: (1) the original extension of credit was proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*, that it has made oral and written requests for payment, withheld delivery of goods or services until overdue debts are satisfied, imposed additional charges for late payment, referred the debt to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a disputed debt in a "commercially reasonable manner" in accordance with 11 C.F.R. § 116.4(a) and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a *bona fide* disagreement between the creditor and the political committee as to the existence of the debt or the amount owed, is not subject to the debt settlement requirements and procedures set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

Commission regulations also state that a commercial vendor may extend credit to a candidate or political committee, provided that the extension of credit is in the ordinary course of

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1 the vendor's business practices and that the terms of the credit are substantially similar to
2 extensions of credit to non-political entities, and they further provide that an extension of credit
3 includes agreements between a vendor and political committee providing additional time to pay
4 an amount due or the failure of the committee to make full payment by the previously agreed
5 upon due date. 11 C.F.R. §§ 116.1(c) and 116.3(a).

6 Here, the complaint questions the circumstances surrounding the negotiation of the debt
7 the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee indicate that
8 they had a *bona fide* dispute regarding the amount that the campaign owed and add that the
9 reduction that was ultimately negotiated was commercially reasonable. As discussed below,
10 there is no information to contradict those contentions.

11 First, there is no information to indicate that the original service contract between 3eDC
12 and the campaign, or that their negotiations concerning the amount owed by the campaign, was
13 not proper pursuant 11 C.F.R. § 116.3(c). See 11 C.F.R. § 116.4(d)(1). The complaint provides
14 no information to demonstrate that 3eDC deviated from its established procedures and past
15 practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While there is no
16 specific information to demonstrate that 3eDC's actions in re-negotiating the fees with the
17 Committee followed the company's established procedures, whether the transaction "conformed
18 to the usual and normal practice in the commercial vendor's trade or industry," or if it was on the
19 same terms as those provided to non-political clients, as required by 11 C.F.R. § 116.3(c)(1)-(3),
20 information available to the Commission shows that 3eDC and the McCain Committee
21 negotiated a reasonable resolution of a commercial dispute. The Commission obtained
22 documentation regarding the initial service contract, correspondence between the parties
23 concerning termination of the contract and negotiation of the debt, and sworn affidavits from

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1 representatives describing the circumstances behind the negotiations. In addition, the
2 Commission obtained lengthy documentation containing the results of the McCain Committee's
3 line item review of its account with 3eDC. Further, the documentation demonstrates that the
4 parties followed procedures established in those agreements in order to terminate the contract,
5 review invoices, and resolve disputed amounts due.

6 Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable.
7 See 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain
8 Committee invoked the "Audit" provision from the Services and License Agreement, before the
9 sixty-day deadline for payment of the final invoices totaling approximately \$725,000, and
10 completed a review of 3eDC's records pertaining to the Committee's account that led to the
11 eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other
12 efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the
13 regulation states that the examples set forth therein are not an exhaustive list. In this matter, the
14 Committee's prompt and thorough review of 3eDC's records suggests that the McCain
15 Committee took reasonable steps to ascertain the correct amount due to the vendor and then paid
16 the amount ahead of schedule. The Committee's actions in accepting the additional terms
17 proposed by 3eDC to settle the debt also support this conclusion.

18 Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to
19 satisfy the outstanding debt, this requirement appears to be directed at committees that wish to
20 pay less on a debt than they admit is owed. Here, the McCain Committee did not admit that
21 anything more than \$585,001.83 was due on the contract, and it paid that amount. 3eDC may
22 not have initially agreed with that figure, but it accepted the results of the McCain Committee's

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1 audit. Thus, the requirement that the McCain Committee use "all" reasonable efforts is satisfied
2 in this case.

3 Finally, the information available supports a finding that 3eDC pursued its remedies as
4 vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.
5 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices,
6 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at
7 § 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary
8 proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest
9 payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to
10 pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested
11 in the non-exhaustive list found in the Commission's regulations, information available indicates
12 that the cost of litigation was one of 3eDC's considerations in deciding to settle the matter for
13 the amount proposed by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business
14 decision to settle the Committee's debt for the bulk of the amount owed, plus interest payments
15 and late fees, rather than spend additional funds in the hopes of obtaining an amount closer to
16 \$725,000, does not appear unreasonable.

17 Thus, the available documentation lends support to the contention that the reduction of
18 the McCain Committee's bill was done in a commercially reasonable manner. As discussed
19 above, the documentation also accounts for the time that passed between the termination of the
20 service contract and the campaign's payment of the amount owed to 3eDC. In past cases in
21 which the Commission determined that in-kind contributions resulted, the cases involved long
22 delays in payment that did not appear commercially reasonable. *See* MUR 5396 (Bauer for
23 President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and

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441b violations resulting from extensions of credit from three different vendors totaling over \$700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the Commission found reason to believe that the committee and two of its vendors violated section 441b by accepting or making illegal corporate extensions of credit totaling over \$900,000 that were unresolved for four months or longer, but took no further action because the debts had been paid in full and some debt collection activity had occurred).

In this matter, the parties negotiated a termination agreement within 7 days of 3eDC's notification of the campaign's material breach of the contract. The Committee's audit of 3eDC's records then lasted almost two months, from July to September 2007. However, upon completion of the audit the campaign sent a detailed summary to 3eDC proposing adjustments in the invoices, and within a few days, the parties negotiated a final agreement for payment of the remaining amount due to 3eDC, that included a payment schedule, interest payments and late fees. The campaign immediately started the required payments in October 2007 and paid the debt off early.

Accordingly, the Commission finds no reason to believe that Rick Davis violated 2 U.S.C. §§ 441a or 441b in connection with the allegations in this matter.

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